

**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT  
DU PAGE COUNTY, ILLINOIS**

**BRIA HEALTH SERVICES, LLC, *et al.*,**

**Plaintiffs,**

**v.**

**ILLINOIS HEALTH FACILITIES AND  
SERVICES REVIEW BOARD, *et al.*,**

**Defendants.**

**No. 2016 MR 808**

**MEMORANDUM OPINION AND ORDER**

**Overview of Parties and Controversy**

Plaintiffs are Bria Health Services, LLC; Community Nursing and Rehabilitation Center, LLC; and Naperville Senior Care, LLC d/b/a The Springs at Monarch Landing. Defendants are the Illinois Health Facilities and Services Review Board and its members (the "Board"); Illinois Department of Public Health ("Department"); Transitional Care of Lisle ("Transitional"); IH Lisle Owner, LLC; IH Lisle Opco, LLC; Innovative Health, LLC; and OnPointe Health Development, LLC. Plaintiffs brought this action for judicial review of the Board's decision to approve project No. 16-002 (the "Project"), a proposal to construct a 68-bed nursing home in Aurora, Illinois.

Plaintiffs are in the business of operating a skilled care nursing facility, and they object to the arrival of a new competitor, Transitional. Plaintiffs' objections focus on the lack of need for the Project based upon the existence of multiple facilities in the community that provide the same services, each of which has available capacity to provide additional care. To prevent the construction of redundant health care facilities, the Illinois Health Facilities Planning Act (the "Act") (20 ILCS 3960/1 *et seq.*) contains licensing procedures. "No person shall construct, modify or establish a health care facility or acquire major medical equipment without first obtaining a permit or exemption from the State Board." 20 ILCS 3960/5.

### **Public Hearing and State Board Report**

On December 31, 2015, Transitional applied to the Board for a permit to build a 68-bed long-term care facility in Aurora, Illinois. A public hearing was conducted on March 14, 2016. Plaintiffs attended the public hearing and presented testimony and written comments in opposition to the Project. The gist of their objection was that there was no need for a new facility in that area because of the excess capacity of existing facilities to provide the same services the Project would provide. Additionally, Plaintiffs argued that the Project would leave them with lower-reimbursement and indigent residents.

Afterward, a state board staff report (the "staff report") was prepared by the Board staff members. The report found that the Project met some of the criteria in the Board's regulations but that it failed to meet other criteria. Specifically, the report found that the Project failed to meet five criteria: (1) service accessibility; (2) unnecessary duplication of service; (3) availability of funds; (4) financial viability; and (5) reasonableness of project costs. A summary of this report found that the proposed Project was not in conformance with the provisions of Part 1125 or Part 1125.800 of the Board's regulations (77 Ill. Adm.Code 1125, 1125.800).

### **The Board's Meeting**

On May 10, 2016, the Board held a meeting, in which it considered Transitional's application, among other applications. The Board heard testimony from individuals in support of and in opposition to the Project, including representatives from Plaintiffs. The Board discussed some matters with Transitional including questions regarding financing, construction costs, and construction timelines. The chairwoman of the Board asked the Board members if they had any further questions. Hearing no further questions, a roll call vote was cast. There were six votes in the affirmative and three in the negative.

### **The Approval Letter**

On May 11, 2016, the Board followed up with a letter to Transitional Care confirming its approval of the Project. The letter states the "approval was based upon the substantial conformance with the applicable standards and criteria in the Illinois Health Facilities Planning Act (20 ILCS 3960) and 77 Illinois Administrative Codes 1110 and 1120." R. at 625. The letter further states, "[i]n arriving at a decision, the **State Board adopted the State Board staff's report and findings, and when applicable, considered the application materials, public hearing**

*testimony, public comments and documents, testimony presented before the Board and any additional materials requested by the State Board staff*" (emphasis in the original). *Id.*

### **STANDARD OF REVIEW**

In reviewing a decision by an administrative agency, the court applies differing standards of review depending on the type of issue for which review is sought. When the court reviews factual findings, those findings are deemed *prima facie* correct and will be reversed only if they are against the manifest weight of the evidence. *Abbott Indus., Inc. v. Dep't of Employment Sec.*, 2011 IL App (2d) 100610, ¶ 15, 954 N.E.2d 292, 296. Where, on the other hand, the issue is the correctness of the agency's conclusions of law, the court's review is *de novo*. *Id.* Finally, where the determination is a mixed question of fact and law, the court applies the "clearly erroneous" standard and will reverse only if its review of the record and the agency's determination leaves the court with the "definite and firm conviction" that the decision was a mistake. *Id.* Under any standards of review, the plaintiff seeking administrative review bears the burden of proof. *Marconi v. Chicago Heights Police Pension Bd.*, 225 Ill. 2d 497, 532–33, 870 N.E.2d 273, 293 (2006), as modified on denial of reh'g (May 29, 2007).

Reviewing the Board's ultimate decision to grant or deny a permit requires this court to examine the legal effects of the facts, which presents a mixed issue of law and fact. *Mercy Crystal Lake Hosp. & Med. Ctr. v. Illinois Health Facilities & Serv. Review Bd.*, 2016 IL App (3d) 130947, ¶ 17, 59 N.E.3d 27, 34. The clearly erroneous standard of review is significantly deferential, and, so long as the record contains evidence supporting the agency's decision, it should be affirmed. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill.2d 76, 88, 180 Ill.Dec. 34, 606 N.E.2d 1111 (1992); *Provena Health v. Illinois Health Facilities Planning Board*, 382 Ill.App.3d 34, 38–39, 319 Ill.Dec. 930, 886 N.E.2d 1054 (2008).

### **ANALYSIS**

The purpose of the Act is to

"establish a procedure (1) which requires a person establishing, constructing or modifying a health care facility, as herein defined, to have the qualifications, background, character and financial resources to adequately provide a proper

service for the community; (2) that promotes, through the process of comprehensive health planning, the orderly and economic development of health care facilities in the State of Illinois that avoids unnecessary duplication of such facilities; (3) that promotes planning for and development of health care facilities needed for comprehensive health care especially in areas where the health planning process has identified unmet needs; and (4) that carries out these purposes in coordination with the Center for Comprehensive Health Planning and the Comprehensive Health Plan developed by that Center.” 20 ILCS 3960/2 (West 2016).

Under the Act, no person may construct, modify, or establish a health care facility without first obtaining a permit or exemption from the Board. 20 ILCS 3960/5 (West 2016).

The Board can “prescribe rules, regulations, standards, criteria, procedures or reviews” to carry out the Act’s purpose and can “develop criteria and standards for health care facilities planning.” 20 ILCS 3960/12(1), (4) (West 2016). The Department must “Review applications for permits and exemptions in accordance with the standards, criteria, and plans of need established by the State Board under this Act and certify its finding to the State Board.” 20 ILCS 3960/12.2(1) (West 2016).

The Board should approve an application if it finds: “(1) that the applicant is fit, willing, and able to provide a proper standard of health care service for the community with particular regard to the qualification, background and character of the applicant, (2) that economic feasibility is demonstrated in terms of effect on the existing and projected operating budget of the applicant and of the health care facility; in terms of the applicant's ability to establish and operate such facility in accordance with licensure regulations promulgated under pertinent state laws; and in terms of the projected impact on the total health care expenditures in the facility and community, (3) that safeguards are provided which assure that the establishment, construction or modification of the health care facility or acquisition of major medical equipment is consistent with the public interest, and (4) that the proposed project is consistent with the orderly and economic development of such facilities and equipment and is in accord with standards, criteria, or plans of need adopted and approved pursuant to the provisions of Section 12 of this Act.” 20 ILCS 3960/6(d) (West 2016).

#### **Sufficiency of Reasoning for Review**

Plaintiffs argue first that the Board failed to provide sufficient reasoning for judicial review, complete with findings of fact and conclusions of law, similar to *Medina Nursing*

*Center, Inc. v. Health Facilities and Services Review Bd.*, 2013 IL App (4th) 120554, 992 N.E.2d 616, 372 Ill.Dec. 774. In making this argument, Plaintiffs contend that the Board failed to discuss the Project in any meaningful way because it relied entirely on the discussion of a previous project. Plaintiffs argue that there was no discussion regarding the Project's nonconformance with some of the Board's criteria or any reasoning for approval of the Project despite these shortcomings.

Defendants, on the other hand, argue that the Board provided sufficient findings and decisions for judicial review, relying on a more recent case, *Mercy Crystal Lake Hosp. & Med. Ctr. v. Illinois Health Facilities & Serv. Review Bd.*, 2016 IL App (3d) 130947, ¶ 20, 59 N.E.3d 27, 405 Ill.Dec. 734.

In *Medina*, Pecatonica Pavilion, LLC, applied to the Board to construct a nursing care facility. *Id.* at ¶ 8. The Department prepared a state agency report in which it found that the project met some, but not all, of the criteria in the Board's regulations. *Id.* at ¶ 12. Overall, the Department concluded that the project was not in substantial conformance with parts 1110 and 1120 of the Board's regulations. *Id.* However, after holding a hearing, the Board approved construction of the new facility. *Id.* at ¶15. The first paragraph of the Board's approval letter stated:

"On March 21, 2011, the Illinois Health Facilities and Services Review Board approved the application for permit for the referenced project based upon the project's substantial conformance with the applicable standards and criteria of Part[s] 1110 and 1120. In arriving at a decision, the State Board considered the findings contained in the State Agency Report, the application material, and any testimony made before the State Board." *Id.* at ¶18.

The letter did not state which criteria in parts 1110 and 1120 were applicable and did not specify which criteria in these parts the project met or failed to meet.

The plaintiffs, competitor operators of long-term care facilities (the "Operators"), sought review of the decision. The trial court entered judgment against the Operators, and the Operators appealed. *Id.* at 20. On appeal, the Operators argued, in part, that the Board failed to provide a reasoning for their decision. *Id.* The appellate court agreed. *Id.* at ¶ 27.

In its analysis, the appellate court found that the decision lacked findings, and, without findings made by the agency (citing 735 ILCS 5/3-108(b)), it could not comply with 735 ILCS 5/3-110, "Scope of Review." *Id.* at ¶ 22-23. That section requires that "[t]he findings and



conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.” *Id.* at ¶ 23; 735 ILCS 5/3-110. The court reasoned that

“to hold the Board’s findings of fact to be prima facie true and correct, we must be informed by the Board what, precisely, those findings of fact are. We do not know which standards and criteria in parts 1110 and 1120 the Board found the project to meet and which ones the Board found the project not to meet. The Board did not adopt the state agency report. Obviously, the Board disagreed with the Department’s conclusion that the project did not substantially conform to parts 1110 and 1120. We have the Department’s findings and conclusions, but we do not have the Board’s findings and conclusions.” *Id.*

The court found that boilerplate language, such as “substantial conformance with the applicable standards and criteria of Part 1110 and 1120,” is “worthless for purposes of judicial review.” *Id.* at ¶ 25. The court remanded the case to the Board “with directions that the Board provide, in writing, a reasoned explanation for its decision in [the] case, complete with ‘findings and conclusion.’” 2013 IL App (4th) 120554 at ¶ 27 (emphasis added).

In *Mercy*, Centegra applied to the Board for a permit to build a hospital. *Id.* at ¶ 4. The Board staff prepared a state agency report that indicated that the project was in compliance with 17 of the 20 review criteria. *Id.* at ¶ 6. The Board ultimately voted to approve the project. *Id.* at 12.

Competitor hospitals (intervenors during the administrative process before the Board) then filed complaints for administrative review. *Id.* at ¶ 13. The trial court found that the Board’s decision did not contain findings of fact or conclusions of law and remanded the matter. *Id.* The Board held another meeting and again approved the permit. *Id.* at ¶ 14. The trial court affirmed the Board’s decision this time around finding that it had articulated its findings and conclusions. *Id.* The competitor hospitals appealed. *Id.*

On appeal, the competitor hospitals first argued that the Board’s written decision following remand was legally deficient because it was devoid of specific reasons for approving the application. *Id.* at ¶ 18. The appeals court disagreed. *Id.* at ¶ 19.

In finding that the Board’s written decision was sufficient, the appeals court reasoned that “[w]here the testimony and documentary evidence is preserved in the record, a reviewing court has a sufficient factual basis upon which to determine whether an agency’s decision is manifestly erroneous without the need for the agency to specify any factual basis for its decision.” *Id.* at ¶ 20. Further, the court found that “[t]o the extent that the court in *Medina Nursing Center*

required the Board to articulate specific reasons for its decision on an application, we decline to follow the holding in that case.” *Id.*

In summary, the *Medina* court found that the Board was required to provide findings of fact and conclusions for review purposes. *Medina*, 2013 IL App (4th) 120554 at ¶ 27. However, the Board’s decision in *Medina* included no findings whatsoever – it did not adopt the findings of the state agency report and it only stated a broad conclusion that the project was not in “substantial conformance with the applicable standards and criteria of Part 1110 and 1120.” *Id.* at ¶ 23-25. The *Mercy* court did not disagree that findings of fact and conclusions should be present upon review, it simply stated that the Board did not have to articulate “specific reasons” in its written decision. *Mercy*, 2016 IL App (3d) 130947 at ¶ 20. A reviewing court’s role in an administrative review is to determine whether the evidence in the record supports the agency’s decision, as opposed to inquiring into the level of detail of the agency’s decision. *Id.*

### Section 11

Section 11 of Illinois Health Facilities Planning Act (the “Act”) also requires the Board to include findings of facts and conclusions of law, providing in pertinent part, “In order to comply with subsection (b) of Section 3-108 of the Administrative Review Law of the Code of Civil Procedure, the State Board shall transcribe each State Board meeting using a certified court reporter. The transcript shall contain the record of the *findings and decisions* of the State Board.” 20 ILCS 3960/11 (emphasis added). Section 3-108(b) of the Administrative Review Law (the “ARL”) states that “the administrative agency shall file an answer which shall consist of the original or a certified copy of the entire record of proceedings under review, including such evidence as may have been heard by it and the *findings and decisions* made by it.” 735 ILCS 5/3-108(b) (emphasis added).

### Board’s Approval

In this case, the Board’s approval letter initially states that the “approval was based upon the substantial conformance with the applicable standards and criteria in the Illinois Health Facilities Planning Act (20 ILCS 3960) and 77 Illinois Administrative Codes 1110 and 1120.” R. at 625. This language is similar to the boilerplate language in *Medina*, yet the Board’s decision here continues: “[i]n arriving at a decision, the **State Board** adopted the **State Board staff’s report and findings**, and when applicable, considered the application materials, public hearing testimony, public comments and documents, testimony presented before the Board and any

*additional materials requested by the State Board staff*" (emphasis in the original). *Id.* Unlike *Medina*, the Board adopted the very detailed staff report and its findings. *Id.* Additionally, the transcript of the Board's hearing includes findings by those Board members in support of the decision of approval. R. at 622-24. Such findings in the transcript include: a five year growth projection exists for the area in which Transitional is applying and a bed need exists within that same area. R. at 622, 624. These findings are also reflected in the staff report. R. at 572-73, 578-79. Moreover, the transcript contains a discussion on the financials of the Project which was a significant part of the Project's nonconformance with Board criteria. R. at 618-21. The transcript also includes testimony from those in support of the Project and those in opposition. R. at 599-615. As a result, the Board has provided a record with sufficient findings and conclusions of law for judicial review.<sup>1</sup> The Court now turns to the issue of whether there is a sufficient factual basis in the record upon which to determine whether the Board's approval of Transitional Care's application was manifestly erroneous.

#### **Review of the Board's Decision**

Plaintiffs argue that the Board's decision was clearly erroneous. A clearly erroneous standard is significantly deferential to an agency's decision, and an agency's decision is only reversed if the court believes that a mistake has occurred based on the entire record. *AFM Messenger Service, Inc.*, 198 Ill.2d at 395. The testimony and documentary evidence preserved in the record should be sufficient for a reviewing court to determine whether an agency's decision is manifestly erroneous. *Mercy*, 2016 IL App (3d) 130947 at ¶ 20.

Plaintiffs first maintain that the decision is clearly erroneous because a "transitional care" facility is not a recognized type of facility under the Act or the Board's regulations. However, this argument is unsuccessful. Transitional is a skilled nursing facility and skilled nursing facilities fall under part 1125, long-term care, of the Health Facilities and Services Review Board. 77 Ill. Adm. Code 1125.140 ("[long-term care] includes the nursing category of service, which provides inpatient treatment for convalescent or chronic disease patients/residents and includes the skilled nursing level of care and/or the intermediate nursing level of care, defined in

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<sup>1</sup> The Court does note that some testimony from individuals supporting/opposing this Project refers back to the prior application hearing and states that the reasoning for supporting/opposing this Project remains the same as that given for the prior application. R. at 599-615. Also, certain Board members referred back to the prior application hearing when speaking at this Project's hearing. R. at 622-23. The Board should be aware that the Court cannot look to hearings for other applications when conducting its review, thus, although it may seem repetitive when back-to-back similar applications are heard, it is important that any reasoning/discussion be addressed in detail for each application individually.



77 Ill. Adm. Code 300”). The Board evaluated Transitional based on its categorization as a long-term care facility as demonstrated by its findings in the staff report and its financial questions pertaining to the findings in the staff report.

Plaintiffs also contend that the application failed to meet several of the Board’s criteria. The staff report found that the Project failed to meet 5 of the 20 criteria. R. at 570. This criteria included service accessibility, unnecessary duplication, availability of funds, financial viability and reasonableness of project costs. *Id.* Plaintiffs also argue that the Board failed to consider the distinction between an existing bed need for skilled nursing beds and the approval of a project dedicated to short-term rehabilitation beds that would be unavailable to meet the long-term skilled nursing needs of a greater community.

An application is not required to meet all review criteria. *Provena Health v. Illinois Health Facilities Planning Bd.*, 382 Ill.App.3d 34, 40, 886 N.E.2d 1054, 319 Ill.Dec. 930 (1st Dist. 2008) (approval of application with seven negative criteria was not clearly erroneous). No one criteria is more an important than any other. *Id.*

The record contains evidence that supports the Board’s decision to approve the application. The adopted staff report makes various findings, indicating that Transitional had satisfied a majority of the criteria. R. at 569-88. Some of the criteria found not in compliance was financial based, and the Board entertained discussion on the Project’s financials at its hearing. R. at 616-21. Based upon the findings in the staff report, most significantly the projection of a 5-year growth in the overall population and resultant need for beds, the Board concluded in the transcript that the Project was necessary. R. at 572, 622, 624. Although the staff report finds that the Project is not in conformance with criterion service accessibility and unnecessary duplication of services, which seems to indicate that there is no need for this Project, these criteria are based on the present situation and the Board largely based its decision on future projections. Aside from this distinction, it is important to remember that “[i]t is not this court’s function to reweigh the evidence.” *Provena*, 382 Ill.App.3d 34 at 47. This Court “will defer to the Board’s discretion, expertise and judgment in weighing and analyzing evidence regarding all statutory and regulatory criteria.” *Mercy*, 2016 IL App (3d) 130947 at ¶ 24. Reviewing the record in its entirety, this Court cannot find that there is no evidence contained therein to support the Board’s findings and conclusions.

Next, Plaintiffs argue that the Board misunderstood the 5-year growth projection and bed need to require approval of the application because a Board member asked: “What if there were three and four applicants for similar number of beds at this meeting? Would we approve them all, even though the total geographical area only allows for so many beds to be built?” and the answer given was “yes.” R. 618. However, some Board members voted to deny the application, which is contrary to Plaintiffs’ argument that the Board members thought that the 5-year growth projection and bed need required approval. R. at 622-23.

Further, Plaintiffs argue that the decision is clearly erroneous because the Board engaged in an improper comparative review between this Project and the prior application. Plaintiffs are correct that each application must be reviewed and decided on an individual basis, but the Court disagrees that the Board engaged in improper comparative review. 77 Ill. Admin. Code 1130.620(d)(2). Although some of the Board’s affirmative votes were “[f]or previously stated reasons,” this does not equate to the Board improperly basing its decision on the prior application’s facts – the same reasoning simply applied to the facts in this case as well. R. at 623. While these few Board members could have repeated their reasoning in specifics, other Board members did clearly state their reasons for approving the Project. R. at 622, 624. Further, the Board adopted the extremely detailed state report and its findings, which were purely based on this Project, and a financial discussion ensued during the Board’s hearing explicitly regarding this Project. R. at 569-88, 616-21. Based on the record as a whole, the Board did not engage in an improper comparative review that would call for this Court to find that the decision was clearly erroneous.<sup>2</sup>

### **Arbitrary and Capricious**

Plaintiffs also argue that the Board’s decision was arbitrary and capricious. An agency’s actions are arbitrary and capricious if the agency: “(1) relied upon factors that the legislature did not intend to be considered; (2) entirely failed to consider an important aspect of the application; or (3) offered an explanation for its decision that either runs counter to the evidence before it or is wholly implausible.” *Mercy*, 2016 IL App (3d) 130947 at ¶ 26 citing *Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 505–06, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988). In

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<sup>2</sup> Aside from the arguments addressed above, Plaintiffs also argue in their complaint that the decision is clearly erroneous because the Board considered new information during the hearing that was not contained in the Project’s application and information was provided by the applicant that was factually inconsistent with the information contained in the application. Plaintiffs fail to address these allegations in any detail and the Court finds no basis to these arguments.

review, the Court is not to substitute its own reasoning for that of the agency. *Greer*, 122 Ill.2d 462 at 506.

Plaintiffs mainly argue that the Board's decision is arbitrary and capricious because the Board failed to consider an important aspect of the application alleging that the Board never discussed the nonconforming criteria and never gave a reason to approve the Project. As discussed above, the Board did entertain a discussion on the financials of the project that were nonconforming, and the Board adopted the staff report's findings and support for those findings which addresses the nonconforming criteria. R. at 568-88, 618-21, 625. Moreover, the transcript includes some Board members' reasons to approve the Project, and the adopted staff report reflects and supports those reasons with a majority of the criteria in compliance. R. at 568-88, 622, 624. For these reasons, and the reasons stated above, the Board's decision was not arbitrary and capricious.

### CONCLUSION

For the reasons set forth herein, the Court finds that the Board provided material sufficient for judicial review, the Board's decision was not clearly erroneous, and the Board's decision was neither arbitrary nor capricious. The Court therefore orders that the decision of the Board is AFFIRMED.

  
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Paul M. Fullerton  
Circuit Court Judge

1-10-17  
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Date